



RETAIL SHOP LEASES AMENDMENT ACT 1997

No. 56 of 1997

SUMMARY OF PROVISIONS

1. Short title
2. Commencement
3. Substitution of s. 1
 1. Short title
4. Amendment of s. 3—Interpretation
5. Amendment of s. 4—Application of Act
6. Amendment of s. 12—Lessee to be given disclosure statement
7. Substitution of s. 13
 13. Certain obligations to be void
8. Amendment of s. 14—Lease preparation costs
9. Repeal of s. 17
10. Insertion of Part 4A

PART 4A TERM OF LEASE AND RENEWAL

Division 1—Preliminary

- 20A. Objects

Division 2—Initial term of lease

- 20B. Minimum 5 year term

Division 3—Renewal of shopping centre leases

Subdivision 1—Application of this Division

- 20C. Application of Division

Subdivision 2—Rules of conduct at end of term

- 20D. Preference to be accorded to existing lessee
20E. Implementation of preferential right
20F. Notice of absence of right of preference
20G. Consequences of failing to begin negotiations or give notice

Subdivision 3—Remedies for non-compliance with rules

- 20H. Fair dealing between lessor and lessee in regard to renewal of lease

Division 4—Other cases

- 20I. Application of this Division
20J. Notice to lessee of lessor's intentions at end of lease

Division 5—General provisions

- 20K. Certified exclusionary clause
20L. Premium for renewal or extension prohibited
20M. Unlawful threats
20N. Exclusion of legal consequences for which express provision is not made
11. Repeal of s. 25
12. Repeal of ss. 27 and 28
13. Amendment of s. 32—Lessor to provide auditor's report on outgoings
14. Repeal of s. 42
15. Repeal of ss. 47, 48 and 49
16. Amendment of s. 60—Associations representing lessees
17. Amendment of s. 81—Amendment of the Landlord and Tenant Act
18. Repeal of schedule



ANNO QUADRAGESIMO SEXTO

ELIZABETHAE II REGINAE

A.D. 1997

No. 56 of 1997

An Act to amend the Retail Shop Leases Act 1995.

[Assented to 31 July 1997]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Retail Shop Leases Amendment Act 1997*.
- (2) The *Retail Shop Leases Act 1995* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Substitution of s. 1

3. Section 1 of the principal Act is repealed and the following section is substituted:

Short title

1. This Act may be cited as the *Retail and Commercial Leases Act 1995*.

Amendment of s. 3—Interpretation

4. Section 3 of the principal Act is amended—

- (a) by inserting in subsection (1) after the definition of "accounting period" the following definition:

"certified exclusionary clause"—see section 20K;;

- (b) by inserting in subsection (1) after the definition of "retail shopping centre" the following definition:

"statutory rights of security of tenure" means the rights conferred on a lessee by Part 4A Division 2 and, if the retail shop lease relates to premises in a retail shopping centre, by Part 4A Division 3.

Amendment of s. 4—Application of Act

5. Section 4 of the principal Act is amended by inserting after paragraph (a) of subsection (2) the following paragraph:

- (ab) the lease is for a term of 1 month or less; or.

Amendment of s. 12—Lessee to be given disclosure statement

6. Section 12 of the principal Act is amended by striking out subsections (2) and (3) and substituting the following subsections:

(2) A disclosure statement is a written document stating or containing—

- (a) the address of the shop; and
- (b) the lettable area of the shop; and
- (c) the permitted uses of the shop; and
- (d) the term of the lease; and
- (e) the hours during which the lessee will have access to the shop outside trading hours; and
- (f) the date on which the shop will be available for occupation; and
- (g) the amount of the base rent payable under the lease and the basis on which the base rent may be changed; and
- (h) any other rent payable under the lease and the basis of its calculation; and
- (i) each category of outgoings the lessee is to be liable to pay or reimburse (in whole or part), and an estimate of the lessee's annual liability for outgoings of each category; and
- (j) whether the amount the lessee is required to pay towards outgoing includes a margin of profit for the lessor and, if so, the percentage profit or the basis on which the profit is to be calculated; and
- (k) the nature of any other monetary obligations imposed on the lessee under the lease and, if possible, an estimate of the annual cost of complying with those obligations; and
- (l) whether any right to renew or extend the term of the lease is given by the lease and, if so, the nature of the right; and
- (m) the legal consequences of breach of a term of the lease (including the consequences of early termination of the lease by the lessee); and
- (n) a warning that oral representations made by the lessor or the lessor's agent on which the lessee has relied should be reduced to writing and signed by or on behalf of the lessor before the lessee enters into the lease; and

- (o) a warning that the lessee should obtain independent legal and financial advice before entering into the lease.

(3) If the shop is situated in a retail shopping centre, the disclosure statement must also state—

- (a) the address of the retail shopping centre; and
- (b) the number of shops in the retail shopping centre and their total lettable area; and
- (c) the number of parking bays available for the use of customers of the shop and the number of parking bays available for use by the lessee and the lessee's employees; and
- (d) the nature of the facilities and services provided by the lessor; and
- (e) whether changes to the retail shopping centre are proposed and, if so, the nature of the changes; and
- (f) the core trading hours; and
- (g) the current tenant mix and any proposed changes to the current tenant mix; and
- (h) whether the lessor is prepared to give the lessee an assurance that the current tenant mix will not be altered to the lessee's disadvantage by the introduction of a competitor; and
- (i) whether there is a tenant association and, if so, the nature of the association, the voting rights of members, and the contributions payable by members; and
- (j) whether contributions are or may be required towards the costs of advertising and promoting the shopping centre and, if so, the estimated annual contribution to be required from the lessee.

(3a) A disclosure statement must comply with requirements of the regulations about the form in which it is to be presented.

Substitution of s. 13

7. Section 13 of the principal Act is repealed and the following section is substituted:

Certain obligations to be void

13. (1) An obligation to make or reimburse capital expenditure may only be imposed by or under a retail shop lease or a collateral agreement in the following cases:

- (a) a lessee may be required to pay or reimburse the cost of making good damage to the premises arising when the lessee is in possession or entitled to possession of the premises; and
- (b) a lessee may be required to fit or refit the shop, or to provide fixtures, plant or equipment, if the disclosure statement discloses the obligation and contains sufficient details to enable the lessee to obtain an estimate of the likely cost of complying with the obligation; and

- (c) a lessee may be required to contribute to a sinking fund to cover major items of repair or maintenance if reasonable details of the lessee's obligation are disclosed in the disclosure statement.

[An obligation that may be imposed under this subsection is called a **permissible obligation**.]

(2) A provision of a retail shop lease or a collateral agreement under which a lessee is required or may be required to make or reimburse capital expenditure is void unless the obligation imposed by or under the provision is a permissible obligation.

(3) A provision of a retail shop lease or a collateral agreement under which the lessee is required to compensate the lessor for depreciation of the premises attributable to ordinary wear and tear is void; but this subsection is not intended to prevent such depreciation being taken into account in the calculation, or assessment, of base rent.

Amendment of s. 14—Lease preparation costs

8. Section 14 of the principal Act is amended by striking out paragraph (b) of the definition of **preparatory costs** in subsection (1) and substituting the following paragraph:

- (b) the costs of attendances on the lessee by the lessor, or a lawyer or registered conveyancer acting for the lessor.

Repeal of s. 17

9. Section 17 of the principal Act is repealed.

Insertion of Part 4A

10. The following Part is inserted after section 20 of the principal Act:

PART 4A TERM OF LEASE AND RENEWAL

Division 1—Preliminary

Objects

20A. (1) The Parliament recognises that conflicts sometimes arise between a lessor's expectation to be able to deal with leased premises subject only to the terms of the lease and a lessee's expectation of reasonable security of tenure.

(2) The objects of this Part are to achieve an appropriate balance between reasonable but conflicting expectations and to ensure as far as practicable fair dealing between lessor and lessee in relation to the renewal or extension of a retail shop lease.

Division 2—Initial term of lease

Minimum 5 year term

20B. (1) The term for which a retail shop lease is entered into must be at least five years.

The term of a retail shop lease is worked out under this section on the assumption that any right or option of renewal or extension under the lease or a collateral agreement will in fact be exercised. However, a right or option of renewal or extension will not be taken into account if it is given after the lease is entered into.

(2) A lease is not invalidated by contravention of this section but the term of the lease is extended to bring the term (or aggregate term) to five years.

If (for example) a lease is entered into for a term of three years, its term is extended by two years to five years. If a lease is entered into for a term of two years with an option for a further one year after that initial two years, the term of the lease is extended to four years (with the option for a further one year after that initial four years).

(3) This section does not apply to a lease if—

- (a) the lease is a short-term lease (*ie* a lease entered into for a fixed term of 6 months or less); or
- (b) the lease arises when the lessee holds over after the termination of an earlier lease with the consent of the lessor and the period of holding over does not exceed 6 months; or
- (c) the lease contains a certified exclusionary clause; or
- (d) the lessee has been in possession of the retail shop premises for at least 5 years; or
- (e) in the case of a retail shop lease that is a sublease—the term of the retail shop lease is as long as the term of the head lease allows; or
- (f) the lease is of a class excluded by regulation from the ambit of this Division.

Division 3—Renewal of shopping centre leases

Subdivision 1—Application of this Division

Application of Division

20C. (1) This Division applies in relation to a retail shop lease of premises in a retail shopping centre entered into after the commencement of this Division.

(2) However, this Division does not apply if—

- (a) the lease is a short term lease (*ie* a lease entered into for a fixed term of 6 months or less); or
- (b) the lease contains a certified exclusionary clause; or
- (c) in the case of a retail shop lease that is a sublease—the term of the retail shop lease is as long as the term of the head lease allows; or
- (d) the lease is of a class excluded by regulation from the ambit of this Division.

*Subdivision 2—Rules of conduct at end of term***Preference to be accorded to existing lessee**

20D. (1) If a lessor of premises in a retail shopping centre proposes to re-let the premises, and an existing lessee wants a renewal or extension of the term, the lessor must give preference to the existing lessee over other possible lessees of the premises.

(2) The lessor is to presume that the existing lessee wants a renewal or extension of the term unless the lessee has notified the lessor in writing within 12 months before the end of the term that the lessee does not want a renewal or extension.

(3) However, the lessor is not obliged to prefer an existing lessee if—

- (a) the lessor reasonably wants to change the tenancy mix in the retail shopping centre; or
- (b) the existing lessee has been guilty of a substantial breach or persistent breaches of the lease; or
- (c) the lessor requires vacant possession of the premises for the purposes of demolition or substantial repairs or renovation; or
- (d) the lessor—
 - (i) does not propose to re-let the premises within a period (the **relevant period**) of at least 6 months from the end of the term; and
 - (ii) requires vacant possession of the premises for the lessor's own purposes during the relevant period (but not for the purpose of carrying on a business of the same kind as the business carried on by the lessee); or
- (e) the renewal or extension of the lease would substantially disadvantage the lessor; or
- (f) the lessee's right of preference is, in the circumstances of the case, excluded by regulation.

Implementation of preferential right

20E. (1) If an existing lessee of premises in a retail shopping centre has a right of preference, the lessor must, at least 6 months (but not more than 12 months) before the end of the term, begin negotiations with the existing lessee for a renewal or extension of the lease.

(2) In particular, before agreeing to enter into a lease with another person, the lessor must—

- (a) make a written offer to renew or extend the existing lease on terms and conditions no less favourable to the lessee than those of the proposed new lease; and
- (b) provide the existing lessee with a copy of the lease or proposed lease (as renewed or extended) and the disclosure statement required in relation to it.

(3) When a lessor offers to renew or extend a retail shop lease under this section—

- (a) the offer remains open for a reasonable period (at least 10 days not including any Saturday, Sunday or other public holiday) after it is given or until its earlier acceptance; and
- (b) the lessee must notify the lessor in writing within the time stated in the offer whether the lessee accepts the offer; and
- (c) if notice is not given within that period, the offer lapses.

(4) The negotiations are to continue until—

- (a) the lessee rejects an offer under this section (or the offer lapses); or
- (b) the lessee indicates in writing that the lessee does not want to continue negotiations for a renewal or extension of the lease.

(5) The negotiations are to be conducted in good faith.

Notice of absence of right of preference

20F. (1) If a lessee of a retail shop in a retail shopping centre does not have a right of preference, the lessor must, at least 6 months (but not more than 12 months) before the end of the term of a lease, by written notice—

- (a) notify the lessee of that fact; and
- (b) state why there is in the circumstances of the case no right of preference¹.

(2) If the term of the lease is for 12 months or less, the periods referred to in subsection (1) are to be reduced by one-half.

¹ See section 20D(3).

Consequences of failing to begin negotiations or give notice

20G. (1) If the lessor fails to negotiate or give a notification to the lessee as required by this Subdivision and the lessee by notice in writing to the lessor given before the end of the term of the lease requests an extension of the lease under this section, the term of the lease is extended until the end of six months after the lessor begins the required negotiations or gives the required notice.

(2) During an extension of the lease under subsection (1), the lessee may terminate the lease by giving not less than one month's notice of the termination in writing to the lessor.

(3) If the term of the lease is for 12 months or less, the period referred to in subsection (1) is to be reduced by one-half.

*Subdivision 3—Remedies for non-compliance with rules***Fair dealing between lessor and lessee in regard to renewal of lease**

20H. (1) If a lessor fails, in any respect, to comply with the rules prescribed in Subdivision 2 and the lessee has, in the circumstances of the case, been prejudiced by the failure, the lessee—

- (a) may lodge a notice of dispute with the Commissioner setting out the lessee's grounds of complaint and applying for mediation of the dispute; or
- (b) may apply to the Magistrates Court for orders resolving the dispute.

(2) If a notice of dispute is lodged with the Commissioner under subsection (1)(a)—

- (a) the Commissioner (or a mediator appointed by the Commissioner) will attempt to resolve the dispute by conciliation; and
- (b) if the dispute is not resolved by conciliation, the Commissioner must, on application by either party, refer the dispute to the Magistrates Court.

(3) On an application or reference under this section, the Court may make any order it considers appropriate to resolve the dispute.

(4) In particular, the Court may—

- (a) order the lessor to renew or extend the lease, or to enter into a new lease with the lessee, on terms and conditions approved by the Court (but not to the prejudice of the rights of a third party who has in good faith acquired an interest in the premises); or
- (b) order the lessor to pay compensation (not exceeding 6 months' rent under the lease) to the lessee.

(5) A fee prescribed by regulation is payable on lodging of a notice or an application under this section.

Division 4—Other cases**Application of this Division**

20I. This Division applies to a retail shop lease other than one—

- (a) to which Division 3 applies; or
- (b) in relation to which a right or option to renew or extend the lease exists.

Notice to lessee of lessor's intentions at end of lease

20J. (1) Not less than 6 months, and not more than 12 months, before the end of the term of a lease, the lessor must by written notice to the lessee either—

- (a) offer the lessee a renewal or extension of the lease on terms and conditions specified in the notice; or

- (b) inform the lessee that the lessor does not propose to offer a renewal or extension of the lease.

(2) A notice under subsection (1)(b) may include other information about the lessor's intentions (for example, that the lessor intends to allow the lessee to remain in possession of the shop as a periodic tenant under a provision of the lease for holding over, or as a tenant at will).

(3) An offer under subsection (1) is not capable of revocation for one month after it is made.

(4) If the lessor fails to give a notification to the lessee as required by this section and the lessee by notice in writing to the lessor given before the end of the term of the lease requests an extension of the lease under this section, the term of the lease is extended until the end of six months after the lessor gives the required notice.

(5) During an extension of the lease under subsection (4), the lessee may terminate the lease by giving not less than one month's notice of the termination in writing to the lessor.

(6) If the term of a retail shop lease is 12 months or less, this section applies to the lease as if the periods of 12 months and 6 months referred to in the above provisions were reduced by one-half.

Division 5—General provisions

Certified exclusionary clause

20K. (1) Subject to this section, the rights conferred by this Part cannot be excluded or modified by contract.

(2) However, the statutory rights of security of tenure may be excluded by a certified exclusionary clause.

(3) A **certified exclusionary clause** is a provision of a retail shop lease in respect of which a certificate signed by a lawyer who is not acting for the lessor is endorsed on the lease to the effect that—

- (a) the lawyer has, at the request of the prospective lessee, explained the effect of the provision and how this Part would apply in relation to the lease if the lease did not include that provision; and
- (b) the prospective lessee gave the lawyer apparently credible assurances that the prospective lessee was not acting under coercion or undue influence in requesting or consenting to the inclusion of the provision in the lease.

Premium for renewal or extension prohibited

20L. (1) A lessee cannot be required to pay a premium for the renewal or extension of a retail shop lease.

(2) If a lessor or a person acting on behalf of a lessor seeks or accepts a premium for the renewal or extension of a retail shop lease—

- (a) the lessor is guilty of an offence and liable to a penalty not exceeding \$10 000; and

- (b) the lessee may recover the amount of the payment as a debt (whether or not the lessor is convicted of the offence).
- (3) This section does not prevent a lessor from—
 - (a) requiring payment from the lessee of a reasonable sum for legal or other expenses incurred in connection with the renewal or extension of a retail shop lease; or
 - (b) receiving payment of rent in advance; or
 - (c) requiring reasonable security from the lessee or another person to secure performance of the lessee's obligations under the renewed or extended lease; or
 - (d) seeking or accepting payment for the grant of a franchise in connection with the renewal or extension of the lease.

Unlawful threats

20M. A lessor or an agent acting for a lessor must not make threats to dissuade a lessee from—

- (a) exercising a right or option to renew or extend a retail shop lease; or
- (b) exercising rights under this Part.

Maximum penalty: \$10 000.

Exclusion of legal consequences for which express provision is not made

20N. Except as expressly provided in this Part, there is no civil remedy for non-compliance with this Part.

Repeal of s. 25

11. Section 25 of the principal Act is repealed.

Repeal of ss. 27 and 28

12. Sections 27 and 28 of the principal Act are repealed.

Amendment of s. 32—Lessor to provide auditor's report on outgoings

13. Section 32 of the principal Act is amended by striking out paragraph (e) and substituting the following paragraph:

- (e) the report need not be prepared by a registered company auditor, and need not comply with paragraphs (c) and (d), if it does not relate to outgoings other than water and sewerage rates and charges, local government rates and charges, and insurance so long as the report is accompanied by copies of receipts for all expenditure referred to in paragraph (a).

Repeal of s. 42

14. Section 42 of the principal Act is repealed.

Repeal of ss. 47, 48 and 49

15. Sections 47, 48 and 49 of the principal Act are repealed.

Amendment of s. 60—Associations representing lessees

16. Section 60 of the principal Act is amended by inserting after “accompanied” in subsection (2) “and represented”.

Amendment of s. 81—Amendment of the Landlord and Tenant Act

17. Section 81 of the principal Act is amended by striking out paragraph (a) of subsection (2) and substituting the following paragraph:

- (a) the former legislation continues to apply, subject to modifications prescribed by regulation, to retail shop leases entered into before the commencement of this Act (including such a lease that is renewed after the commencement of this Act under a right or option of renewal conferred before the commencement of this Act); but.

Repeal of schedule

18. The schedule of the principal Act is repealed.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

E. J. NEAL Governor